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No. 02-1667

IN THE

Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

v.

GEORGE LANE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit.

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE[1]

The American Bar Association ("ABA"), with more than 405,000 members, is the leading national membership organization of the legal profession. Its mission "is to be the national representative of the legal profession, serving the

[1] This brief has not been authored in whole or in part by counsel for a party and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondents have consented to the filing of this brief.

Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

public and the profession by promoting justice, professional excellence and respect for law."[2]

The ABA has a particularly strong interest in ensuring that all persons, including individuals with disabilities, enjoy equal and effective access to federal, state, and local courts. The official goals of the ABA include promoting "full and equal participation in the legal profession by minorities, women, and persons with disabilities."[3] Many ABA members who have disabilities[4] have a direct interest in the continued viability of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), as a measure to ensure equal and effective access to the services, programs, and activities of state and local governments, especially their judicial systems.

The ABA has a long history of advocacy in support of the full participation of individuals with disabilities in the legal system.[5] In 1989, the ABA resolved to support "federal legislation which prohibits discrimination on the basis of disabilities."[6] In 1991, the ABA adopted a policy that calls for affirmative conduct on the part of local judicial districts to create a judicial system that is "barrier-free" to individu-

[2] American Bar Association, *ABA Policy and Procedures Handbook* 1 (2002).

[3] ABA Goal IX; *see also* ABA Goal I (to promote improvements in the American justice system), and ABA Goal II (to promote meaningful access to the American justice system for all persons), *available at* http://www.abanet.org/about/goals.html (last visited Nov. 6, 2003).

[4] More than 1,500 ABA members have returned questionnaires to the ABA stating that they have one or more disabilities.

[5] Since 1945, the ABA has had a standing committee or commission dedicated to the rights of individuals with disabilities. For years, the ABA has supported initiatives to ensure access to public buildings and transportation for people with physical disabilities, and since 1976, it has published what is now called the Mental and Physical Disability Law Reporter, the most exhaustive periodical available on disability law.

[6] ABA Section on Individual Rights & Responsibilities and the Young Lawyers Division, *Recommendation, Report No. 128* (Aug. 1989).

als with disabilities.[7] In 2002, the ABA adopted a resolution specifically urging "all federal, state, territorial, and municipal courts to help ensure equal access to justice by making courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, court employees, witnesses, and observers."[8] The resolution recommends that courts make reasonable accommodations to "meet the needs of the individual, including, where appropriate, removal of architectural barriers, modification of rules and practices, and provision of auxiliary aids and services."[9] In light of the ABA's nationwide membership and its longstanding commitment to the cause of equal access to justice for individuals with disabilities, the ABA has a special perspective to provide and a strong interest in the matter before the Court.

SUMMARY OF ARGUMENT

This case raises issues central to the ABA's mission of promoting meaningful access to the American system of justice for all persons. The issues in this case are also fundamental to the American conception of a system of justice, for the Constitution guarantees to all persons the right of access to the judicial system.

The courts—as guardians of individual rights—have a special responsibility to protect and enforce the right of equal access to the judicial system because this right is the baseline for all other rights. First and foremost, the courts must ensure that their doors remain open to all individuals. In the case of individuals with disabilities, this obligation means providing accommodations and removing barriers

[7] ABA Committee on Legal Problems of the Elderly and the Committee on Mental & Physical Disability Law, *Recommendation, Report No. 115* (Aug. 1991).

[8] ABA Committee on Mental & Physical Disability Law, *Recommendation, Report No. 112* (Feb. 2002).

[9] *Id.*

that otherwise have the effect of excluding people with disabilities from the judicial system. In short, the courts must be a model of accessibility.

That courts be barrier free—and thus open to all—is vital to the legitimacy of and public confidence in the administration of justice. A lack of equal access to the courts harms not only those persons who are excluded, but also the system itself, which is deprived of the benefits of their inclusion. In addition, the exclusion from the justice system of any segment of society undermines public confidence in the system. It therefore is imperative that the courts ensure that individuals with disabilities are not excluded from participation in any capacity—as litigants, witnesses, attorneys, judges, jurors, courthouse staff, or observers.

Despite the importance of such access to the judicial system, however, individuals with disabilities continue to face the effects of discrimination in state courts and state judicial services and activities. Although the Americans with Disabilities Act of 1990 ("ADA") has significantly reduced barriers to the justice system encountered by individuals with disabilities, such individuals continue to be excluded from state judicial systems throughout the nation because of the failures of state courts to remove barriers to those individuals' participation. Countless lawsuits and enforcement actions continue to demonstrate that, in 2003, access to state courts still is anything but equal for individuals with disabilities.

In light of the barriers that still exist, Title II of the ADA remains essential to ensuring continued improvement in equal and effective access to the courts for individuals with disabilities because it requires the States to act affirmatively to ensure the accomplishment of that goal. Enforcement of Title II, in turn, is essential to ensuring that the right of access to the States' courts is real—and not merely theoretical—for individuals with disabilities.

ARGUMENT

I. THE COURTS MUST BE ACCESSIBLE TO ALL, INCLUDING INDIVIDUALS WITH DISABILITIES, TO ENSURE THE LEGITIMACY OF AND PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE.

More than 49,700,000 Americans—roughly one in five of the 257,200,000 million people in the United States age five or older—have mental or physical disabilities or other long lasting impairments. U.S. Census Bureau, *Disability Status: 2000*, *available at* http://www.census.gov/hhes/www/disable/disabstat2k/disabstat2ktxt.html (last visited Nov. 10, 2003). Prior to the enactment of the ADA, these individuals faced the discriminatory effects of "restrictions and limitations, . . . purposeful unequal treatment, and . . . political powerlessness in our society." 42 U.S.C. § 12101(a)(7). Although there have been incremental improvements in the way individuals with disabilities are treated since the ADA's enactment in 1990, individuals with disabilities continue to encounter architectural, communication, and attitudinal barriers to vital public services, programs, and activities including most notably courts of law and the judicial system as a whole.

A. The Judicial System Must Be Accessible To Individuals With Disabilities In Order To Maintain Fairness, Legitimacy, And Public Confidence In The Administration Of Justice.

Public confidence in the judicial system rests largely upon courts' ability to advance—and to be seen as advancing—fairness, justice, and equal treatment before the law. In order to achieve these goals, the courts must afford all individuals, including those with disabilities, the right and opportunity to participate fully in the justice system.

1. To be fair, and to be perceived as fair, the judicial system must be accessible to individuals with disabilities with business before the courts.

That all individuals should enjoy equal access to the courts is a basic tenet of our democratic society. It is en-

shrined in our Constitution and recognized by this Court. *See, e.g.*, *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (holding that the Due Process Clause guarantees an accused the right to be present at all stages of trial); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, all civil litigants must be afforded a meaningful opportunity to be heard); *Chambers* v. *Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Justice Stevens thus stated:

> *Freedom of access to the courts is a cherished value in our democratic society....* The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system.... *This Court, above all, should uphold the principle of open access.*

Talamini v. *Allstate Ins. Co.*, 470 U.S. 1067, 1070-1071 (1985) (Stevens, J., concurring) (footnotes omitted) (emphasis added).

Unreasonable exclusion of individuals from the proceedings and activities of courts undermines the legitimacy of the courts and decreases public trust in the judicial system as a whole. *See, e.g.*, Speech by Hon. Sandra Day O'Connor to the Ninth Circuit Judicial Conference (Aug. 6, 1992), in *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745, 760 (1994) ("When people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law."); *Bothwell* v. *Republic Tobacco Co.*, 912 F. Supp. 1221, 1230 (D. Neb. 1995) ("[T]he reduction of governmental resources to provide legal services to the poor is, for them, a removal of the civil justice system's accessibility (and thus, its legitimacy)."). To be perceived as fair, courts at a minimum must open their doors to individual litigants and defendants, including those who require accommodations for disabilities.

2. To be fair, and to be perceived as fair, the judicial system also must be accessible to individuals with disabilities acting in other capacities, such as judges, jurors, and court personnel.

The rights of individuals with disabilities to have equal access to the courts and to participate in the administration of justice are consistent with our democratic heritage and critical to public confidence in the administration of justice. Only by increasing the participation of individuals from traditionally disadvantaged communities as judges, jurors, and court employees can we hope to increase the legitimacy of and respect for the courts and the judicial system as a whole within these communities. *See, e.g.*, Brief of the American Bar Association as Amicus Curiae Supporting Respondents, at 10, 19, in *Grutter* v. *Bollinger*, 123 S. Ct. 2325 (2003) ("The compelling public interest in minority participation in the institutions of our democratic government is beyond dispute. ... Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled. Our nation's founders recognized that a legitimate government depends upon the participation of all the people.") (citation omitted).

Conversely, exclusion of individuals based upon a characteristic such as race or disability generates distrust and a lack of public confidence in the judicial system. *See, e.g.*, *id.* at 19-22. For this reason, the Court long has held that juries must be drawn from a representative cross-section of the community:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Taylor v. *Louisiana*, 419 U.S. 522, 530-531 (1975) (citing *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); *see also Powers* v. *Ohio*, 499 U.S. 400, 406-407 (1991); *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970).

Similarly, in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946), this Court reversed a conviction on the ground that the "purposeful and systematic exclusion of women from the [jury] panel" violates the fundamental tenet that one's fitness to participate in the judicial system must rest on an individualized determination based upon competence, rather than a generalized group determination based upon presumed common characteristics. This Court stated:

> '[P]rospective jurors shall be selected by court officials without systematic and intentional exclusion of any . . . groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'

Ballard, 329 U.S. at 192-193 (quoting *Thiel*, 328 U.S. at 220).

Although this Court's decisions regarding access to and participation in the judicial system have dealt primarily with race and gender, the principles underlying those decisions apply with equal force in the case of individuals with disabilities. Just as equal access must be available to individuals without regard to their race or gender, so too must it be available to individuals without regard to their physical abilities or disabilities, so long as they are competent to serve or participate, given reasonable accommodations.

B. The Lack Of Equal And Effective Access To The Judicial System For Persons With Disabilities Harms Not Only Those Persons, But Also The Courts, Which Are Deprived Of The Benefits Of These Individuals' Participation And Contributions.

The arbitrary exclusion of any minority or traditionally disadvantaged group, including individuals with disabilities, does as much harm to the judicial system as to the individuals who are excluded.[10] In Justice Marshall's words, "[t]he effect of excluding minorities goes beyond the individual defendant, for such exclusion produces injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *McCray* v. *New York*, 461 U.S. 961, 968 (1983) (dissenting from denial of certiorari) (internal quotation marks omitted); *see also Batson* v. *Kentucky*, 476 U.S. 79, 87 (1986); *Ballard*, 329 U.S. at 195.

Common sense, as well as historical experience, strongly suggests that participation by a diverse group of individuals is beneficial to the administration of justice. *See, e.g.*, Hon. Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002) ("[R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process."); *cf.* Hon. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992) ("Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding [his colleagues] to respond not only to the persua-

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[10] The exclusion of individuals with disabilities harms not only the excluded individual and the judicial system at large, but also the rights of other participants, including, for example, criminal defendants who have a Sixth Amendment right to be tried not only by a fair "cross section of the community," *Taylor*, 419 U.S. at 526, but also "by a jury whose members are selected pursuant to nondiscriminatory criteria," *Batson*, 476 U.S. at 85-86 (citations omitted).

siveness of legal argument but also to the power of moral truth."). To exclude individuals with disabilities from the courtroom is thus not only to deny individual litigants their right but also to deprive the bench or jury of viewpoints or ideas that may be unique to individuals who have experienced life with a disability or disabilities.

II. Persons With Disabilities Historically Have Faced And Continue To Face Exclusion From States' Judicial Programs, Services, And Activities.

A. Before Enactment Of The ADA, States Denied Persons With Disabilities Access To Judicial Programs, Services, And Activities.

Title II of the ADA was enacted against the background of a history and pattern of discrimination by the States against the disabled in which "[t]he courthouse door" was literally "still closed to Americans with disabilities." 2 Staff of the House Comm. on Educ. and Labor, 101st Congress, 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans With Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) (Sen. Harkin). The legislative record of the ADA contains numerous references to state failure to make courts and courthouses accessible to individuals with disabilities. In one notable instance, a witness at a congressional hearing testified that she "went to the courtroom one day and . . . could not get into the building because there were about 500 steps to get in there." *Id.* at 1070-1071 (Emeka Nwojke). And as Justice Breyer noted in his dissent in *Board of Trustees* v. *Garrett*, 531 U.S. 356, 377-382 (2001), the legislative record of the ADA sets forth numerous other instances of States' failures to make courthouses accessible—including failures to provide interpreter services for people who are deaf, to accord adult victims of abuse with developmental disabilities their equal right to testify in court, to provide amplified sound systems in courtrooms, to install access ramps and curb cuts in courthouse areas, and to enable an

individual using a wheelchair to obtain a marriage license when the courthouse was not wheelchair accessible.

This evidence in the legislative record is confirmed by reports documenting States' failures to make courthouses accessible. A 1989 survey conducted by the Attorney General's Commission on Disability for the State of California found that "[m]any court rooms, jail visiting rooms and jails have architectural barriers that make them inaccessible to people who use wheelchairs."[11] In Massachusetts in 1990, 60% of the State's 97 courthouses were found to lack ramps or accessible toilets.[12] A comprehensive report issued by the United States Commission on Civil Rights in 1983 describes the types of discrimination that people with disabilities have encountered nationwide, including the per se "[d]isqualification of many handicapped persons from jury service" and the "[a]bsence of accommodations to permit handicapped persons to serve as jurors."[13]

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[11] Attorney General's Comm'n on Disability, *Final Report* 102 ¶ c (Dec. 1989).

[12] Renee Loth, *State Auditor Criticizes Courthouse Conditions*, Boston Globe, Feb. 16, 1990, at 100; *see also Kroll* v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) (holding Missouri county in contempt for failing to make courthouse accessible despite 1989 consent decree requiring structural changes).

[13] *See, e.g.*, U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983). Those who were able to gain physical access to the courthouse nonetheless often were flatly excluded from jury service. Before the ADA, blanket exclusion of blind persons, deaf persons, and individuals with mobility difficulties was routine. *See Galloway* v. *Superior Court*, 816 F. Supp. 12, 16 (D.D.C. 1993) (enjoining, in 1993, the Superior Court of the District of Columbia from excluding all blind persons from jury service); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399 (W.D. Pa. 1989) (finding violative of the Rehabilitation Act the exclusion of individual who is deaf and who reported for jury service accompanied by ASL interpreter); *Hill* v. *Shelby County*, 599 F. Supp. 303 (N.D. Ala. 1984) (concerning exclusion of persons with disabilities from jury service, including exclusion of the individual because he could not reach second floor courtroom); *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1243 (E.D. Ark. 1978) (ruling that "[i]mpairment of the senses, particularly the senses of

B. Access To Judicial Programs, Services, And Activities Remains Inadequate Or Nonexistent For Many Individuals With Disabilities.

Since 1990, as localities have begun to comply with Title II of the ADA, courthouse and courtroom access has improved, but lack of access to courthouses and courtrooms remains a serious problem for individuals with disabilities in many communities. Virtually every quarterly status report issued since 1994 by the U.S. Department of Justice regarding ADA enforcement identifies numerous cases and settlements involving States' failures to provide adequate access to judicial services for persons with disabilities.[14]

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sight and hearing, vitiates a person's ability to serve effectively as a juror"); *Gall* v. *Commonwealth*, 702 S.W.2d 37 (Ky. 1985) (noting that persons with disabilities were excluded from lists for jury service); *Lewinson* v. *Crews*, 282 N.Y.S.2d 83 (App. Div. 1967) (excluding a blind college professor from serving as a juror by applying a New York law that excludes from jury service any individual "not in possession of his natural faculties" or otherwise "infirm and decrepit"), *aff'd*, 236 N.E.2d 853 (N.Y. 1968); *State* v. *Spivey*, 700 S.W.2d 812, 813 (Mo. 1985) (rejecting the argument that exclusion of individual who is deaf from jury service violated constitutional rights of defendant who is deaf on ground that "public interest" supported exclusion).

[14] Just in 2001, for example, (1) a small Ohio city agreed to make its courtroom accessible; (2) Ben Hill County, Georgia, reached an agreement with the Department of Justice to install an accessible ramp, construct accessible toilet rooms, and install an elevator to the second floor, within nine months of settlement; (3) a California county small claims court agreed to modify its courthouse for people with mobility impairments and reschedule cases to accessible locations when requested; (4) an Iowa district court and a South Carolina court agreed to provide sign language interpreter services; (5) Saguache County, Colorado, agreed to make physical modifications to its entrances and restrooms and install an elevator to provide access to services on the second and third floors; (6) a county superior court judge agreed to provide an individual who is deaf with a real time court reporter at a civil trial and to train all court judges on the requirements of the ADA; (7) an Arkansas county agreed to install an elevator so that individuals with disabilities could gain access to the third floor courtroom; and (8) a New York town agreed to remodel its town hall to make accessible the courthouse and clerk's offices housed within the building. *See Enforcing the ADA: A Status Report from the Department of Justice, available at* http://www.usdoj.gov/crt/enforce.htm #anchor2010570 (last visited Nov. 6, 2003).

A 1997 survey by the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee listed an array of failures in accommodations for individuals with disabilities in the California state court system.[15] In seven public hearings conducted by Subcommittee on Access for Persons with Disabilities of the Judicial Council Access and Fairness Advisory Committee, 59% of the 148 speakers testified to problems with physical access to California courts.[16]

In a report on the issue of access to courts and courthouses in the State of Washington, a subcommittee of the Governor's Committee on Disability Issues and Employment noted that approximately 20 courts (nearly 20% of those responding to its questionnaire) identified access problems under the ADA and other failures to comply with the ADA.[17]

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[15] Judicial Council of California, Subcomm. on Access for Persons with Disabilities, *Access to the California State Courts: A Survey of Court Users, Attorneys and Court Personnel* (Jan. 1997), *available at* http://www.courtinfo.ca.gov/programs/access/documents/dis_surv.pdf (last visited Nov. 6, 2003); *see also* Maryann Jones, *And Access for All: Accommodating Individuals with Disabilities in the California Courts*, 32 U.S.F. L. Rev. 75, 88-97 (1997).

[16] The lack of suitable access also affects parole hearings. For example, in a California class action suit for injunctive relief under Title II of the ADA and the Rehabilitation Act of 1973, the district court found that "[s]ome prisoners who use wheelchairs have had to crawl up stairs to get to their hearings; mentally retarded prisoners who cannot even spell their names have waived their right to hearings and have spent years in prison without the benefit of any assistance; a blind witness was denied access to information at his hearings because he could not see the documents; and hearing impaired prisoners who normally express themselves by using sign language had their hands shackled at their hearings making such communication impossible." Findings of Fact and Conclusions of Law, *Armstrong* v. *Davis*, C94-2307 CW, at 5:10-19 (N.D. Cal. filed Dec. 22, 1999).

[17] Governor's Committee on Disability Issues and Employment: Civil and Legal Rights Subcommittee, *Interim Court and Courthouse Access Project* 3 (Sept. 5, 2000); *see also* Letter from Michael J. Swanson,

A 1996 survey of Texas state courts conducted by the Texas Civil Rights Project found the "accessibility of courtrooms for jurors, litigants, members of the public, and attorneys with disabilities [to be] abysmal and unjustifiable."[18] The New York State Commission on Quality of Care for the Mentally Disabled found that only 8% of all courtrooms were fully accessible, more than 80% of the state courts had no assistive listening systems or TDDs available, and 65% of the courts did not provide accessible parking spaces.[19]

Since April 2002, at least seven individuals who are deaf have filed suit against the Minnesota state court system for its failure to provide interpreter services, or for providing unqualified interpreters, for the individuals' court appearances.[20] One of the plaintiffs alleged that he went to the courthouse *seven times* to resolve a traffic ticket dispute, and each time the court failed to provide an interpreter or

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Esq., to Deborah L. Cochelin, Chair of the Court Improvement Committee of the Washington State Bar Ass'n, re "Court Improvement Committee WSBA" (Sept. 3, 1998) (detailing accessibility problems in several courthouses throughout the state, including, for example, the lack of ramps and elevators at the Garfield County Courthouse where sheriff deputies, if available, had to carry individuals who use wheelchairs into the courthouse and up the stairs).

[18] Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* 4 (Nov. 1996).

[19] New York State Comm'n on Quality of Care for the Mentally Disabled & the New York State Bar Ass'n Comm. on Mental & Physical Disability, *Survey of Access to New York State Courts for Individuals with Disabilities* 13 (Feb. 1994).

[20] *See Zacharias* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Apr. 3, 2002); *Dia Xiong* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003); *Losing* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Feb. 18, 2003); *Fietek* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Jan. 17, 2003); *Curtin* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Dec. 19, 2002); *Vatne* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Mar. 6, 2003).

provided one who did not know how to sign legal terms and concepts.[21] All seven cases arose after the Minnesota court system purportedly had "[taken] steps" in 2002 to resolve its "difficulties with providing sign language interpreter services in the period from November 2001 to May 2002."[22]

As these examples clearly illustrate, thirteen years after passage of the ADA, many court systems remain seriously in default on even their most basic obligations under the law. The ADA therefore remains essential to efforts to ensure that States and localities do not deprive persons with disabilities of access to the justice system.

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[21] *Curtin* v. *Minnesota Supreme Court*, District Court Second Judicial District (filed Dec. 19, 2002).

[22] *See* Supreme Court of Minn., *Notice To Deaf Community* (Aug. 12, 2003); *see also* Settlement Agreement Under the Americans with Disabilities Act, *No Barriers, Inc.* v. *Cornelius*, Civ. No. 3:97CV-2330-R ¶ 4 (N.D. Tex. Feb. 2002) (agreeing to correct all violations so that each facility would be accessible to and usable by individuals with disabilities, including individuals in wheelchairs); Consent Decree and Order, *Salmond* v. *County of Teton*, No. CV-97-130-GF-LBE (D. Mont. 2000) (involving enforcement action to obtain accessible entrance and elevators or other means to reach upper floors of courthouse); Settlement Agreement Between the United States of America and the County of Essex, New Jersey, DOJ # 204-48-78 (Dec. 9, 2002) (agreeing to improve access through structural improvements, including providing accessible parking, elevators, and courtroom seating). Numerous other cases and settlements are listed in the *DOJ Status Report on Enforcing the ADA, Jan.-Mar. 2003, available at* http://www.usdoj.gov/crt/ada/janmar03.htm (last visited Nov. 10, 2003), including: *United States* v. *Massachusetts* (involving inaccessibility of courtrooms and offices located up flights of stairs in buildings without ramps or elevators); settlement in Lucas County, Ohio (involving inaccessibility of courthouses for individual with impaired mobility); settlement in Ohio (involving county probate and juvenile court in Ohio that did not provide qualified sign language interpreters); settlement in Texas county (involving sheriff's department that did not use sign language interpreter to communicate with parent of juvenile being questioned); settlement (involving failure to provide assistive device to hard of hearing defendant); settlement in Mississippi (involving court's failure to provide a sign language interpreter to defendant who is deaf).

III. Title II Of The ADA Is Essential To Ensuring That Individuals With Disabilities Have Equal And Effective Access To The Judicial System.

This Court has found a right of access inherent in numerous constitutional provisions, including the Due Process Clauses, the Privileges and Immunities Clause of Article IV, and the First Amendment.[23] Moreover, the Court has made clear that this right of access is a right of *equal* access. *See Griffin* v. *Illinois*, 351 U.S. 12, 16 (1956) (plurality opinion). Persons with disabilities are entitled to the benefit of this right of access no less than any other persons. Title II of the ADA is a constitutionally appropriate implementation of that constitutional guarantee.

A. The Right Of Equal And Effective Access To The Courts Is A Core Aspect Of Constitutional Guarantees And Is Essential To Ensuring The Proper Administration Of Justice.

This Court has articulated at least four distinct ways in which the Constitution protects a right of access to the courts. First, under the First Amendment, the public has the right to attend and observe judicial proceedings. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (opinion of Burger, C.J.). Openness to all the public, which this Court has called "one of the essential qualities of a court of justice," *id.* at 567 (citation omitted), ensures that the judicial system is perceived to be fair and deserving of public confidence. "[T]he means used to achieve justice must have

[23] *See Boddie*, 401 U.S. at 377 (Due Process Clause "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"); *Chambers*, 207 U.S. at 148 ("[t]he right to sue and defend in the courts is . . . one of the highest and most essential [Art. IV] privileges of citizenship"); *California Motor Transp. Co.* v. *Trucking Unltd.*, 404 U.S. 508, 510 (1972) (right to petition gives rise to a right of access to the justice system).

the support derived from public acceptance of both the process and its results." *Id.* at 571.

Second, the Due Process Clause secures the right to initiate proceedings in court to seek judicial relief from unlawful treatment at the hands of the government. This issue has arisen most frequently in the context of prisoner access to the courts, but this Court has recognized that the right of prisoner access is simply one part of a more general "right of access to the courts, . . . [which] is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974); *see also Bounds* v. *Smith*, 430 U.S. 817, 821-822 (1977).

Third, the Due Process Clause prevents the States from obstructing any individual's "[r]esort to the judicial process" when that process is central to "interests of basic importance in our society." *Boddie*, 401 U.S. at 376. In *Boddie*, the Court invalidated a requirement that litigants pay filing fees and costs, when that requirement effectively prevented indigent persons from bringing an action for divorce. *See id.* at 374. In finding that access to the courts was a central aspect of due process, the Court explained the central role of the courts in securing individuals' rights and duties:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . . It is to the courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.

Id. at 374-375.

Finally, when important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. "[P]ersons forced to settle their claims of right

and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377. To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise. *See M.L.B.* v. *S.L.J.*, 519 U.S. 102, 125 (1996); *id.* at 128-129 (Kennedy, J., concurring in the judgment). Even when due process does not obligate the State to establish an avenue of judicial redress (such as an appeal), once the State does so, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966).

Thus, the State may not insist on court fees and costs when to do so would prevent an indigent person from defending against a "devastatingly adverse action" in court, such as a possible deprivation of parental rights or loss of liberty. *See M.L.B.*, 519 U.S. at 125; *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Griffin*, 351 U.S. 12. Similarly, when an indigent man is confronted with a paternity action and cannot pay for blood tests that would dispel a presumption that he is the father, due process requires the State to shoulder the cost of the tests. *See Little* v. *Streater*, 452 U.S. 1, 14-15 (1972). And it has long been understood that, as a matter of due process, the State must provide assistance, such as an interpreter, to one who could not otherwise understand the proceedings in his criminal trial. *See United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-390 (2d Cir. 1970); *People* v. *Aguilar*, 677 P.2d 1198, 1203-1204 (Cal. 1984).

The principle that the State must provide equal access to the courts is equally applicable to persons with disabilities. A person with a disability who faces the loss of his freedom, children, or property in a judicial proceeding similarly must have meaningful access to the courts. He cannot be said to enjoy equal and effective access to the courts unless he can actually attend, follow, and participate in the

proceeding. Meaningful, not merely theoretical, access to the courts is required by the Constitution. If someone who uses a wheelchair cannot even enter the courtroom where his liberty is at stake, he has no more access to justice than does the indigent person who cannot pursue an appeal because he lacks the funds for the filing fee.

B. Because Fundamental Rights Are At Stake When Access To The Judicial System Is Denied, More Than A Rational Basis Is Necessary To Justify Exclusion.

In *Board of Trustees* v. *Garrett*, where this Court held that States may not be made subject to private suits for money damages under Title I of the ADA, the Court emphasized that that case involved only claims of discrimination in employment of persons with disabilities. 531 U.S. 356 (2001). The employment context was crucial in *Garrett* because employment decisions by governmental entities ordinarily do not implicate any kind of heightened scrutiny. Had the plaintiffs in *Garrett* sought to pursue employment discrimination claims against Alabama state entities under the Equal Protection Clause, they would have faced the hurdle that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.* at 367.

Title II of the ADA is quite different, however, because it often implicates constitutionally protected rights—e.g., the right to vote, the right to marry, the right to raise one's children, the right to be free from cruel and unusual punishment, and, as in this case, the right of access to the courts—that are entitled to greater protection than the rational basis test provides. First, as noted above, the First Amendment right to attend judicial proceedings is a protected right for all members of the public that may not be restricted absent an "overriding consideration." *Richmond Newspapers*, 448 U.S. at 564; *Globe Newspaper* v. *Superior Court*, 457 U.S. 596 (1982). Although there may be practical limitations, such as space and expense, that might limit the number of

attendees a court can accommodate, *see Richmond Newspapers*, 448 U.S. at 581 n.18, this Court never has suggested that mere administrative inconvenience or even budgetary considerations would be sufficient to deny a member of the public the right to enter a courthouse and attend a proceeding there.

Second, this Court's numerous other right-of-access cases discussed above are solidly grounded in the Due Process Clause (although they also may rely upon the Equal Protection Clause) and frequently rely upon the Court's balancing approach in decisions such as *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Notably, these due process decisions do not exhibit the deference to the State that is characteristic of rational basis decisions such as *Heller* v. *Doe*, 509 U.S. 312 (1993). To the contrary, as the Court explained in *M.L.B.*, when an individual faces the deprivation of a cherished right through the state machinery of justice, that individual's interest in securing equal and effective access to the courts often outweighs state concerns about inconvenience and cost. *See* 519 U.S. at 124-125; *id.* at 129 (Kennedy, J., concurring in the judgment); *see also Little*, 452 U.S. at 16-17 (relying on *Mathews* test to conclude that "the State's monetary interest is hardly significant enough to overcome private interests as important as those here") (internal quotation marks and citation omitted). Thus, a State may be required to offer financial assistance to one seeking to pursue judicial proceedings; at a minimum, the State may not deny access to those proceedings to one who is unable to pay the State's customary court fees, *id.*, even though the State has no *general* obligation to ensure that the burdens and benefits of government do not fall unequally based upon the relative wealth of its citizens, *see San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 51-54 (1973).

Third, due process may require the State to make accommodations or exceptions for particular individuals in order to safeguard their right of access to the courts, even if the State's general rule would be rational and constitutionally valid as applied to most other individuals. Thus, in *Bod-*

die, the Court held that the State's requirement of payment of costs for a divorce action implicated the "right to a meaningful opportunity to be heard within the limits of practicality," which "must be protected against denial by particular laws that operate to jeopardize it for particular individuals." 401 U.S. at 379-380. The Court made clear that even a "generally valid" approach or procedure "may fail to satisfy due process because of the circumstances" of a particular litigant if it "operates to foreclose [that] particular party's opportunity to be heard." *Id.*

These decisions make clear that a rational basis such as administrative convenience or cost concerns will not justify the State's failure to ensure within reason that persons with disabilities are able to enter courthouses, attend judicial proceedings, or participate fully in matters to which they are parties.

C. Under Any Level Of Scrutiny, The Denial Of Meaningful Access To The Courts For Individuals With Disabilities Who Are Capable, With Or Without Reasonable Accommodations, Should Be Impermissible Under The Fourteenth Amendment.

Although denying persons with disabilities meaningful access to the judicial system requires application of a more rigorous standard of review than a "rational basis," this Court need not decide this case on that particular ground, for this Court's precedents also establish the principle that denying persons with disabilities meaningful access to the courts fails any standard of review and therefore is impermissible under the Fourteenth Amendment.

That the "rational basis" test cannot justify a State's effectively excluding persons from the justice system altogether has been made clear in this Court's precedents involving access to the courts for indigent persons. In those cases, this Court has held that a State's refusal to open the courthouse door to persons who cannot pay an otherwise generally applicable filing fee is irrational and invidious and

therefore violative of the Fourteenth Amendment. For example, in *Mayer* v. *Chicago*, 404 U.S. 189 (1971), this Court invalidated an Illinois Supreme Court practice under which only indigent persons convicted of felony offenses, and not indigent persons convicted of nonfelony offenses, could obtain free transcripts of their criminal trials for their appeals. Although the State argued that it had legitimate interests in saving money and in not burdening the court system with appeals in minor cases, this Court held that "[t]he invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant." *Id.* at 197.

Similarly, in *Burns* v. *Ohio*, 360 U.S. 252 (1959), this Court invalidated an Ohio Supreme Court practice under which indigent persons had no opportunity to file a petition for discretionary leave to appeal to the Ohio Supreme Court without prepayment of filing fees (after having had review in an intermediate appellate court). Stressing that the Ohio Supreme Court had "effectively foreclosed access to the second phase of [criminal appeals] solely because of [individuals'] indigency," this Court found "no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants." *Id.* at 257.

A central feature of these decisions is that there is no suggestion that either the Illinois or the Ohio Supreme Court was attempting to bar the door to indigent persons' appeals *because* they were indigent. That is, the practices did not result from a "bare desire . . . to harm a politically unpopular group," or "negative attitudes" toward indigent people. *Cf. Garrett*, 531 U.S. at 381. Moreover, these practices of denying assistance to indigent persons were not intentional exclusions, but the result of a failure to take notice of the needs of particular litigants. The Court found that these practices were "irrational" and "invidious," however, because they effectively excluded indigent persons from the avenues of justice.

So too here, a State that effectively denies persons with disabilities access to its court system by failing to accommodate the unique needs of each individual engages in invidious and irrational practices in violation of the Fourteenth Amendment. No "rational basis" can justify a State's ignoring the fully foreseeable fact that persons who (for example) use wheelchairs or have hearing impairments or are blind frequently have business in our nation's courts and courthouses and can neither enter the building nor understand the proceedings without reasonable accommodations.

D. Title II Of The ADA's Requirement Of Affirmative Conduct On The Part Of States Is Essential To Ensuring That Individuals With Disabilities Obtain Real, Not Merely Theoretical, Access To The Judicial System.

Under the Equal Protection Clause, it is normally sufficient if a State does *not* take cognizance of the status of any of its individual citizens. A violation of equal protection is ordinarily established only when the decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979). Thus, the evenhanded application of a formally neutral law usually will satisfy equal protection principles.

But as this Court's access cases make clear, the requirement of equal treatment is not satisfied where the obvious result is the denial of an individual's due process rights. Rather, a different analysis is required when the State attempts to deprive an individual of his liberty and that individual cannot meaningfully participate in judicial proceedings without reasonable accommodations where appropriate, such as the removal of architectural barriers, modification of rules and practices, or provision of auxiliary aids and services. Just as a non-English-speaking individual is denied due process when proceedings against him are conducted in a language he cannot understand with no provision for making them intelligible to him, and just as an in-

digent individual is denied due process if he lacks the means to pursue an appeal from his criminal conviction with no provision for assistance, a person with a disability is denied due process if the State fails to provide him with any accommodation and thereby effectively denies him meaningful access to the courts. As the Court explained in *Boddie*, "[t]he State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due." 401 U.S. at 380. Thus, due process may require affirmative conduct on the part of the State to ensure that individuals with disabilities can participate meaningfully in judicial proceedings.

This Court has recognized this very point in its prior disability cases. For example, in a case involving Section 504 of the Rehabilitation Act of 1973, on which Title II of the ADA was modeled, this Court noted that "a refusal to modify an existing program," even if neutrally framed, "might become unreasonable and discriminatory." *Alexander* v. *Choate*, 469 U.S. 287, 300 (1985) (internal quotation marks omitted). "[A]n otherwise qualified handicapped individual must be provided with meaningful access .... The benefit itself, of course, cannot be denied in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to ensure meaningful access, reasonable accommodations in the ... program or benefit may have to be made." *Id.* at 301.

There are numerous situations in which individuals with disabilities may be deprived of meaningful access to the judicial system, and therefore denied due process, because of a State's failure to act affirmatively to make reasonable accommodations. As dramatically illustrated by the present case, a State cannot plausibly be said to afford an individual due process in judicial proceedings if that individual cannot even enter the courthouse where his liberty is at stake. Similarly, sign language interpreters, Computer Aided Real-Time Transcription services (for persons who are deaf and do not understand sign language), "induction loop" systems

in courtrooms (for individuals who use hearing aids), Braille signage, and other accommodations may be necessary to ensure that individuals with disabilities can participate meaningfully in judicial proceedings. In such circumstances, it is no answer for the State to excuse its failure to provide lifts, sign language interpreters, Braille documents, and other accommodations by saying that it formally treats all individuals alike. As countless examples have shown, "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

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States' persistent and continuing failure to provide equal and effective access to the judicial system for individuals with disabilities should itself be constitutionally impermissible. By providing in Title II of the ADA a legal remedy against such violations, Congress has acted appropriately to enforce the guarantees of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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